TANG KING KAI, RE

HIGH COURT, SINGAPORE
CHAO HICK TIN J
[ORIGINATING SUMMONS NO. 155 OF 1988]
5 FEBRUARY 1991

LEGAL PROFESSION: *Disciplinary Committee - Duties - Whether committee should make express reference in its report of the provisions of a statute - Legal Profession Act [Sing], ss. 80, 90.*

Following complaints against TKK, a disciplinary committee, under the chairmanship of Justice K, was appointed on 1 April 1987 to hear and investigate several charges against TKK . On 19 December 1987 the committee submitted its report and recommendations. The Law Society then applied for an *ex parte* order for TKK to show cause as to why he should not be dealt with under s. 80 of the Legal Profession Act (the Act). An order in terms was granted on 7 March 1988.

However, on 13 May 1988, the Law Society applied to the Court, *inter alia*, for an order that the order of 7 March 1988 be stayed until further order. In an affidavit deposed by CHY on behalf of the Society it was stated that the order of 7 March 1988 had not yet been perfected and had not been served on the respondent. The deponent also said that the disciplinary committee had not, in its report, made a determination on two of the charges against the respondent. The chairman of the committee, K, had since passed away.

There were three issues before the Court:

(a) whether an express reference in the report to the wording of s. 90(1)(c) of the Act is vital;

(b) whether the disciplinary committee (minus the Chairman who had since died) could reconvene and make a report in the proper form;

(c) if the answer to the second issue is in the negative, whether the disciplinary committee (minus the Chairman) could be re-constituted under a new Chairman and then proceed to make a report in the proper terms.

Held:

[1] Under s. 90(1) of the Act, the disciplinary committee has a duty to make the appropriate determination. However, this does not mean that the disciplinary committee must repeat the words of the provision and that failure to do so would render the determination no determination; so long as its meaning is clear, it does not matter how the determination is worded. To hold otherwise would be stretching technicality to the extreme and would be placing too much importance on form rather than substance.

[2] The object of Part VII of the Act is to provide a fair system to discipline errant solicitors, not to protect them. It is also a system to ensure that errant solicitors are appropriately dealt with in the interest of the public.

[3] The fact that the committee has found TKK guilty of grossly improper conduct within the meaning of s. 80(2) must necessarily mean that the matter is not a trivial one but is of a gravity which warrants, in accordance with s. 80(1), the striking off the roll or suspension from practice not exceeding two years or a censure.

[4] If the committee had intended to hold that the grossly improper conduct was not of sufficient gravity to proceed under s. 80 and that the solicitor should only be reprimanded, it would have so pronounced, as it did in relation to the first and the fourth charges. There is no room for conjecturing that the committee had not decided that disciplinary action under s. 80 should be proceeded against TKK on that charge.

[5] In relation to charge No. 3, the additional words at the end of the paragraph make it clear beyond a shadow of doubt that the committee has decided that TKK should be dealt with under s. 80.

[6] If the Court is wrong in holding that the committee has decided that TKK should be disciplined under s. 80 in respect of the 2 charges, it would not be in order for the three remaining members of the committee to reconvene and carry on where it left off and submit a fresh report or a supplementary report.

[7] If the Court is correct in saying that the committee has decided that action be taken against TKK under s. 80 but wrong in saying that it does not matter that the committee did not adopt the precise wording of s. 90(1)(c), the defect, being really a mere formality, can be put right by the remaining three members re-convening and submitting a supplementary report in proper terms.

[8] If the Court is wrong on both [6] and [7], it must follow that the Chief Justice must be requested to appoint another person as the Chairman. In that event, there has to be a complete rehearing and justice would demand that other members of the disciplinary committee should also be changed, in order to prevent any possibility of prejudice.

[Order accordingly.]

Cases referred to:
Marsland v. Taggart [1928] 2 KB 447 ***(dist)***
Munday v. Munday [1954] 2 All ER 667 ***(cit)***
Ng v. R [1987] 1 WLR 1356 ***(cit)***
Re David Marshall [1972] 2 MLJ 221 ***(cit)***
Re Francis Seow [1973] 1 MLJ 199 ***(cit)***
Re Linus Joseph [1990] 3 MLJ 392 ***(cons)***
Re Roy and College of Nurses of Ontario 107 DLR (3 Edn.) 437 ***(dist)***
R v. Huntingdon Confirming Authority [1929] 1 KB 698 ***(cit)***
R v. Kent Police, Ex parte Godden [1971] 2 QB 662 ***(cit)***
Tan Boon Chee v. Medical Council [1980] 2 MLJ 116 ***(cit)***

Legislation referred to:
Health Disciplines Act 1974 [Canada], s. 85
Legal Profession Act [Sing], ss. 80(1), (2)(a), (b), 87(3), (6), (7), 90(1)(a), (b), (c), (2), (3), 91, 94(1), 95(1)

For the applicant - Michael Khoo
For the respondent - Gavin Lightman QC (Cheong Yuen Hoe with him)

JUDGMENT

Chao Hick Tin J:

On 1 April 1987 a disciplinary committee under the chairmanship of Mr. Justice T Kulasekaram (retired), now deceased, was appointed by the Chief Justice under the Legal Profession Act to hear and investigate four charges against one Tang King Kai (TKK), an advocate and solicitor, following complaints made by two advocates and solicitors. The same committee was also appointed to hear two charges each against two other solicitors, which also arose from the same complaints.

After a hearing which stretched over several days, the committee submitted its report on 19 December 1987. In the report the committee made the following findings and determinations in respect of the four charges against TKK:

Charge 1

Bearing in mind the high degree of proof required in these cases, the committee feels that the Society has only established a clear case of negligence on the part of TKK in holding out PT as a partner since 1981 and not that he had wilfully acted in breach. The committee is **not satisfied** that from the facts there **is a case of sufficient gravity** within the meaning of s. 80(2)(b) in respect of this charge, but nevertheless determined that TKK should be reprimanded for the same under s. 90(1)(b) of the Act. (Emphasis added).

Charge 2

The committee finds that there was negligence shown on the part of TKK in failing to ensure that the undertaking given to SLB was honoured. This negligence was so culpable as to amount to grossly improper conduct in the discharge of his profession and duty within the meaning of s. 80(2)(b). (See *Re Francis Seow* [1973] 1 MLJ 199).

Charge 3

The committee finds that the failure to inform SLB of the sale of No 70 Greenwood Ave by TKK was deliberate and with foresight of its consequences even though by that act of omission he enjoyed no pecuniary advantage. In the light of the undertaking given by his firm on 15 April 1985, there was a duty on his part to so inform. He failed to discharge that duty promptly or at all.

The test of what constitutes grossly improper conduct in the discharge of his professional duties has been laid down by the cases to mean conduct which is dishonourable to the solicitor as a man and dishonourable in his profession. (See *Re David Marshall* [1972] 2 MLJ 221). Applying this test, the committee is of the view that TKK's conduct comes within s. 80(2)(b) of the Act and he should be dealt with accordingly.

Charge 4

Although TKK ought to have been aware that PT had no practicing certificate from 1981 to 1986 the Law Society was not been (*sic*) able to prove that TKK had acted knowingly and wilfully against the Legal Profession Act in this case. The committee would also apply the same reasoning in the first charge against TKK in DC/SEC/3/87 and determine that the ends of justice would be met by administering a reprimand to him in respect of this charge under s. 90(1)(b) of the Act.

Following the receipt of the report of the disciplinary committee and pursuant to s. 91 of the Legal Profession Act, the Law Society applied *ex parte* in this originating summons for an order that TKK should show cause why he should not be dealt with under the provisions of s. 80 of the Act. An order in terms was granted by the then Chief Justice on 7 March 1988.

On 13 May 1988 the Law Society of Singapore applied by way of a summons in chambers (*ex parte*) in this originating summons, for the following orders:

1. the order of Court made on 7 March 1988 in terms of these originating summons be stayed until further order;
2. the disciplinary committee appointed, heard and investigated into the complaints against Tang King Kai do make its determination in accordance with s. 90(1) and (2) of the Legal Profession Act;
3. in respect of such determination the appointment of the chairman of the disciplinary committee, the late Mr. Justice T Kulasekaram be revoked and that the vacancy created by such revocation be filled by another member to be appointed under s. 87(3) of the Legal Profession Act;

4. the six-month period within which the disciplinary committee is required to make its findings and determination under s. 90(3) of the Legal Profession Act be extended to a further period of six months from the date of the making of the order hereon.

In an affidavit deposed to by one Mr. Chim How Yan on behalf of the Law Society and filed in support of the application, it was stated that the order made on 7 March 1988 had not yet been perfected and neither had it been served on TKK, the respondent. Mr. Chim further stated that it had come to his knowledge that the disciplinary committee had not in its report "determined on two of the charges which of the provisions under s. 90(1) of the Legal Profession Act on which the said Tang King Kai should be dealt with". The affidavit went on to say that the chairman of the disciplinary committee had since the submission of the report passed away.

When the *ex parte* summons-in-chambers came up before the then Chief Justice, he adjourned the matter and directed that the papers be served on TKK, the respondent. That is the application now before me.

Mr. Michael Khoo who appeared for the Law Society conceded that in the report of the disciplinary committee there was no **express** determination by the committee in the language of alternative (c) to s. 90(1) of the Act in respect of the second and the third charges. The following are the issues identified and argued upon before me by both Counsel:

(i) Must there be an express reference in the report in the terms of the wording of s. 90(1)(c) of the Legal Profession Act before a matter may be proceeded with further against an advocate and solicitor under s. 80 of the Act;

(ii) If the answer to the first issue is in the affirmative, and bearing in mind the findings of the disciplinary committee, could the disciplinary committee (minus the chairman who has since deceased) re-convene and make a report in the proper terms;

(iii) If the answer to (ii) is in the negative; could the disciplinary committee be re-constituted by the appointment of a new chairman who will then, together with the three existing members, proceed to make a report in the proper terms.

Before I proceed to examine the issues I think it is necessary that I should first set out the relevant provisions of the Legal Profession Act. I must however explain that a new edition of the Act was published in 1990. The numbering of the sections has changed. However, for convenience and to avoid confusion, I will nevertheless stick to the previous numbering:

80(1) All advocates and solicitors shall be subject to the control of the Supreme Court and shall be liable on due cause shown to be struck off the roll or suspended from practice for any period not exceeding two years or censured.

(2) Such due cause may be shown by proof that an advocate and solicitor:

(b) has been guilty of fraudulent or grossly improper conduct in the discharge of his professional duty or guilty of such a breach of any usage or rule of conduct made by the Council under the provisions of this Act as in the opinion of the Court amounts to improper conduct or practice as an advocate and solicitor.

90(1) After hearing and investigating any matter referred to it, a disciplinary committee shall record its findings in relation to the facts of the case and according to those facts shall determine:

(a) that no cause of sufficient gravity for disciplinary action exists under s. 80;

(b) that while no cause of sufficient gravity for disciplinary action exists under that section the advocate and solicitor should be reprimanded; or

(c) that cause of sufficient gravity for disciplinary action exists under that section.

(4) The findings and determination of the disciplinary committee under this section shall be drawn up in the form of a report ...

91(1) If the determination of the disciplinary committee under s. 90 is that cause of sufficient gravity for disciplinary action exists under s. 80 the Society shall without further direction or directions proceed to make an application in accordance with s. 95.

(2) If the determination of the disciplinary committee under s. 90 is that no cause of sufficient gravity for disciplinary action exists under s. 80, it shall not be necessary for the society to take any further action in the matter unless so directed by the Court.

95(1) An application that a solicitor be struck off the roll or suspended from practice or censured or that he be required to answer allegations contained in an affidavit shall be made by originating summons *ex parte* for an order calling upon the solicitor to show cause.

Issue No 1

Under s. 90(1) a disciplinary committee is required, in the light of its findings on the facts in relation to each matter, to decide which of the three alternative determinations it would make. Firstly, it could decide that there is no cause of sufficient gravity for the matter to proceed under s. 80; second, that there is no sufficient cause to proceed under s. 80, but it feels that the advocate and solicitor should be reprimanded; third, that cause of sufficient gravity for disciplinary action exists under s. 80.

The arguments of Mr. Lightman may be summarized as follows. In relation to the second and third charges the disciplinary committee did not expressly state that "cause of sufficient gravity for disciplinary action exists under (s. 80)". That being the case, it follows that no determination was made by the disciplinary committee. What is given to the disciplinary committee under s. 90(1) is not so much a power but a duty; a duty to make one of the three determinations set out in that provision: see *Re Linus Joseph* [1990] 3 MLJ 392 at 395. He said that without a proper determination as required under s. 90(1) no further steps may be taken against a solicitor, not even by a complainant pursuant to s. 94(1). Mr. Lightman also emphasized that while the report of the committee referred to grossly improper conduct on the part of TKK, it did not necessarily follow that the committee had decided that cause of sufficient gravity existed under s. 80 and that the solicitor must therefore be dealt with under that section. He could very well be dealt with under s. 90(1)(b) instead of 90(1)(c). Mr. Lightman submitted that the Court should not readily find that there was an implied determination under s. 90(1)(c).

I accept that under s. 90(1) a disciplinary committee has a duty to make the appropriate determination. The Court of three Judges had clearly so stated in *Re Linus Joseph* (at p. 395):

> The disciplinary committee's determination under s. 90 of the Act is a duty it must discharge and not merely a power which it may exercise.

However, the question is, does it follow that there could only be a proper determination within s. 90(1)(c) if the very specific words spelt out in that provision are used? Take a situation under s. 90(1)(a). If a disciplinary committee were to hold that the complaint was dismissed and say nothing more does it mean that there is nevertheless no determination because the specific words are not used? Does it mean that the committee must be asked to re-convene to put matters right or worse still a new committee be appointed to hear the case all over again (quite apart from the question of double jeopardy)? If the answer to each of

these two questions is "no", and I think it must be "no", then the same reasoning must apply in deciding whether the committee has made a determination under s. 90(1)(c). I do not think it matters how the committee has worded the determination so long as its meaning is clear.

We come now to the next question, is it abundantly clear from the report that the disciplinary committee has determined in relation to the 2nd and the 3rd charges that "cause of sufficient gravity for disciplinary action exists under that section", "that section" refers to s. 80. The determination of the disciplinary committee on the 2nd charge is as follows:

> this negligence was so culpable as to amount to grossly improper conduct in the discharge of his profession and duty within the meaning of s. 80(2)(b).

As I have stated above, Mr. Lightman has argued that it does not follow that just because the committee has determined that TKK was guilty of grossly improper conduct within the meaning of s. 80(2)(b), that it has also determined that disciplinary action should be taken against TKK under that section. He contended that it is entirely possible and consistent for the committee to determine that the case be proceeded with under s. 90(1)(b).

I am unable to accept this argument for two reasons. First, the fact that the committee has found TKK guilty of **grossly** improper conduct within the meaning of s. 80(2)(b) must necessarily mean that the matter is not a trivial one but is of a gravity which warrants, in accordance with s. 80(1), the striking off the roll or suspension from practice not exceeding two years or a censure. With respect, I think it defies logic and good sense to say that notwithstanding what it has held, the committee could have intended that the complaint is not of sufficient gravity to proceed under s. 80 and that a reprimand would do. It would have been different if the committee had merely held that TKK was guilty of improper conduct and said nothing more. It seems to me clear that proof of each of the act or misconduct set out in s. 80(2)(a) - (i) and (k) is *ipso facto* cause of sufficient gravity for disciplinary action to be taken under the same section. Secondly, if the committee had intended (notwithstanding the illogicality pointed out above) to hold that the grossly improper conduct was not of sufficient gravity to proceed under s. 80 and that the solicitor should only be reprimanded, it would have so pronounced, as it did in relation to the 1st and the 4th charges. I would point out that it did specifically say in relation to the first charge that it was not satisfied that "there (was) a case of sufficient gravity within the meaning of s. 80(2)(b)". In my view, there is really no room for conjecturing that the committee has not decided that disciplinary action under s. 80 should be proceeded against TKK on that charge.

Turning to charge no. 3, the determination of the committee is even clearer and it is as follows:

> The test of what constitutes grossly improper conduct in the discharge of his professional duties has been laid down by the cases to mean conduct which is dishonourable to the solicitor as a man and dishonourable in his profession ... Applying this test the committee is of the view that TKK's conduct comes within s. 80(2)(b) of the Act **and he should be dealt with accordingly.** (Emphasis is mine).

With the additional words at the end of the paragraph, it is clear beyond a shadow of a doubt that the committee has decided that TKK should be dealt with under s. 80.

The reference in both these two determinations to s. 80(2)(b) is most significant. While I agree that s. 90(1) imposes a duty on the disciplinary committee, that in no way means that the disciplinary committee must repeat the very words of the provision and any failure so to do would render the determination no determination. In my opinion that would be stretching technicality to the extreme and placing too much importance on form rather than substance.

After all what is the object of Part VII of the Legal Profession Act? It is to provide for a fair system to discipline errant solicitors. It is not just a system to protect solicitors, as argued by the respondent's Counsel, but also a system to ensure that errant solicitors are appropriately dealt with in the interest of the public. I think a fair construction should be given to those provisions rather than a purely technical one. Like all statutory provisions, they should be reasonably construed.

Mr. Lightman referred me to the Canadian case *Re Roy and College of Nurses of Ontario* 107 DLR (3 Edn) 437. That case concerned s. 85 of the Canadian Health Disciplines Act 1974, and the power of the relevant authority to suspend the certificate of competence of a nurse. Under that provision a nurse could only be suspended or the case be referred to the registration committee after a board of inquiry had submitted its report to the executive committee. No board of inquiry was appointed to look into the complaint and there was no report. Reid J (of the Ontario High Court) held that this must be done before any hearing or suspension could be ordered. He said that:

> this is a valuable safeguard for a member against hasty or arbitrary action. I cannot regard it as a mere formality.

The Court refused to read "board of inquiry report" to mean "or complaints committee report."

I do not think our case here is anywhere near to that in *Re Roy and College of Nurses* where an essential pre-requisite under the law, a board of inquiry report, was missing altogether.

2nd and 3rd Issues

In the light of my opinion above, there is really no need for me to go into the 2nd and the 3rd issues. However, as arguments have been submitted to me on those issues, I shall briefly indicate my views thereon. Mr. Lightman has said that he would not be taking any points based on *functus officio* or *antrefois acquit*.

If I may repeat, what I have decided above is that firstly it is clear that the committee has determined that TKK should be proceeded against under s. 80; and secondly, it does not matter that the specific words set out in s. 90(1)(c) are not expressly repeated in its report. If I am wrong to hold that the committee has decided that TKK should be disciplined under s. 80 in respect of the two charges, and this point being obviously fundamental, I do not think it would be in order for the three remaining members of the committee to re-convene and carry on where it left off and submit a report afresh or a supplementary report. A 3-member committee, minus the chairman, is not a committee within the meaning of the Act. Mr. Khoo relied on the case *Marsland v. Taggart* [1928] 2 KB 447. But that case is not quite on point. There a Magistrate's Court consisting of three justices dismissed a complaint but agreed to state a case for the opinion of the High Court. Before the case was stated one of the justices died and the case was accordingly signed by only two justices. Hewart CJ held that it was proper so to do. One should note that in *Marsland* there was already a decision to state a case.

However, if I am correct to say that the committee has decided that action be taken against TKK under s. 80 but am wrong to say that it does not matter that the committee did not adopt the precise wording of s. 90(1)(c), then I would follow *Marsland* and hold that the defect, being really a mere formality, can be put right by the remaining three members re-convening and submitting a supplementary report in proper terms.

If I am wrong on both the preceding two suppositions, then it must follow that the Chief Justice would have to be requested to appoint another person as the chairman. The question then would be whether it is in order for the new chairman, together with the remaining three members, to submit a fresh report or make a supplementary report based on the evidence already recorded? The difficulty here is that unless there is a complete re-hearing, the new chairman would not have heard the evidence. There is authority to suggest that every member of a tribunal who participated in the decision must hear all the evidence: see *Ng v. R* [1987] 1 WLR 1356; *Tan Boon Chee v. Medical Council* [1980] 2 MLJ 116; and *R v. Huntingdon Confirming Authority* [1929] 1 KB 698. Further, under s. 87(6) and (7) of the Act it is provided that, apart from the lay person on the disciplinary committee, all other members must be present at every meeting of the disciplinary committee. Accordingly, I would agree with the submission of Mr. Lightman that there has to be a complete re-hearing; and in that event justice would demand that not only should a new chairman be appointed, the other members of the disciplinary committee should also be changed, in order to prevent any possibility of prejudice: see the views of Lord Merriman, in *Munday v. Munday* [1954] 2 All ER 667 at 671 and *R v. Kent Police, Ex parte Godden* [1971] 2 QB 662.

Reverting to the application proper before me, I am of the view that the disciplinary committee has made its determinations in relation to the 2nd and the 3rd charges and there is no necessity to stay the order of Court of 7 March 1988. Neither is there a need to make any order in relation to the other prayers.

Also found at [1991] 3 CLJ 1994